SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 621

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
*Appellants,*

*vs.*

L. A. TUCKER TRUCK LINES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

# MOTION TO AFFIRM

B. W. La Tourette,
G. M. Rebman,
*Counsel for Appellee.*

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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**Civil No. 7490(3)**

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L. A. TUCKER TRUCK LINES, INC.,

*Plaintiff,*

*vs.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

*Defendants*

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## MOTION TO AFFIRM

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Appellee, L. A. Tucker Truck Lines, Inc., pursuant to Rule 12, Paragraph 3, of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court herein be affirmed.

This is a direct appeal from the final judgment and decree entered on December 7, 1951 (The Court's Opinion rendered by Judges Woodrough, Hulen and Harper, was entered on October 18, 1951, and reported in 100 Fed. Supp. 432), by a specially constituted District Court of three Judges convened pursuant to Section 2284, Title 28 of the United States Code, sustaining Appellee's complaint, setting aside an order of the Interstate Commerce Commission and remanding said cause to the Interstate Commerce Commission for such action as it may deem appropriate, and in accordance with the Opinion of the Court.

The Commission's order of January 13, 1950, and the Certificate issued pursuant to such order on August 7, 1950, authorized C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, to conduct operations as a common carrier by motor vehicle over regular routes and between points and places as more particularly set out in said Certificate of Public Convenience and Necessity No. MC 105120, after having found that the present and future public convenience and necessity require such operations by said C. L. Cunningham, d/b/a Pemiscot Motor Freight Company, and that said C. L. Cunningham was fit, willing and able to conduct such operations.

Appellee herein intervened in opposition in said proceedings before the Interstate Commerce Commission to protect its interests insofar as they would be affected by the granting of said application.

After having exhausted its remedies before the Interstate Commerce Commission, Appellee brought the instant action in the Federal District Court for the Eastern Division of the Eastern District of Missouri, challenging said order of the Interstate Commerce Commission as having been unjust, arbitrary, unreasonable and without basis in fact and law. Subsequent to the filing of its petition herein and after April 16, 1951, to-wit: on or about May 20, 1951, Appellee herein learned that the Examiner to whom the case was assigned for hearing by the Interstate Commerce Commission was not at that time, to-wit: On January 27, 1949, a hearing examiner qualified pursuant to the requirements of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.* Upon learning of the lack of qualifications of the Examiner, Appellee, by leave of Court, filed its motion to amend its complaint, together with the amendment thereto, alleging as additional grounds of complaint and invalidity, that the order of the Interstate Commerce Commis-

sion was null and void by reason of the fact that the person to w' om said proceedings were assigned for hearing and by whom same was heard, was not a hearing examiner duly qualified in accordance with the provisions of the Administrative Procedure Act, *supra.*

The District Court, in its Opinion and final judgment and decree, found that the order of the Interstate Commerce Commission was null and void because the Interstate Commerce Commission did not have jurisdiction, in that the proceedings under review had not been heard by a properly qualified person in accordance with the requirements of the Administrative Procedure Act, *supra.*

This appeal presents only the narrow question, whether orders of the Interstate Commerce Commission entered on a record made before one not a qualified hearing examiner under the provisions of the Administrative Procedure Act are void or merely voidable.

In essence, the above question presents the primary issue upon which Appellants rely in the instant case, namely, that failure of Appellee to have raised this objection before the hearing or at least before the Interstate Commerce Commission precludes Appellee from raising the question for the first time on an appeal in Court, as well as the subsidiary issue of whether the requirements of the Administrative Procedure Act are substantial or procedural—if substantive, we submit, Appellee cannot be held to have waived the question; if procedural, the judgment of the District Court must be reversed and the cause remanded.

No useful purpose would be served by reciting the history of events which led to the enactment of the Administrative Procedure Act, 5 U. S. C. Sections 1001 *et seq.*, as such history is briefly and concisely discussed in the case of *Wong Yang Sung* v. *McGrath*, 339 U. S. 33. Suffice it to say, that after having reviewed such history, the legislative history

and the Administrative Procedure Act, this Honorable Court concluded at Page 53 in that case:

> "We hold that deportation proceedings *must* conform to the Administrative Procedure Act if resulting orders are to have validity." (Italics Supplied.)

Perhaps, in the instant case the niceties of language were not studiously observed when the District Court, at our suggestion, found the Order of the Interstate Commerce Commission void for lack of jurisdiction, because of non-conformity to the requirements of the Administrative Procedure Act. Possibly the word "jurisdiction" or the phrase "lack of jurisdiction" should not have been used, or was used too loosely. However that may be, it is the substance of the decision of the District Court which must be affirmed, irrespective of the language in which it is expressed. Obviously, the District Court, again following our suggestion, read into this Court's decision in *Wong Yang Sung* v. *McGrath, supra,* the thought that non-conformity to the requirements of the Administrative Procedure Act in effect ousted the Agency of Jurisdiction, premised on the reasoning that while the proceedings were of a nature over which the Immigration Service had jurisdiction, nevertheless, the assigning of such proceedings to one not qualified under the Administrative Procedure Act, *supra,* was an assignment to one not personally invested with "jurisdiction" to hear and try such cases—that, therefore, there having been a lack of qualification of and jurisdiction in the hearing officer, jurisdiction could not subsequently be regained without beginning *de novo.* This by reason of the fact that the proceeding was one, such as must be heard in accordance with the Administrative Procedure Act to satisfy the requirements of "due process." "Due process" could not be supplied without conforming to the requirements of the Administrative Procedure Act.

Irrespective, however, of the propriety of the choice of such word as "jurisdiction", one fact becomes apparent from a reading of the *Wong Yang Sung* v. *McGrath* case, *supra*, and that is that an order entered following proceedings not in conformity to the requirements of the Administrative Procedure Act is *not valid*. This Court did not say, "voidable"; its language was unequivocal.

Insofar as the facts of the instant case are concerned, they are squarely identical to the facts in the *Wong Yang Sung* v. *McGrath* case, *supra*, that is, in the *Wong Yang Sung* case, the petitioner made no objection during the conduct of the agency proceedings with respect to the qualifications of the Immigration Inspector who initially heard the case. The matter proceeded through the regular channels of the Immigration Department in the same manner as the application of C. L. Cunningham was processed before the Interstate Commerce Commission. Wong Yang Sung raised the question of the qualifications of the hearing examiner for the first time in the District Court. Again, in the instant case, L. A. Tucker Truck Lines, Inc., admittedly raised the question in Court for the first time.

Further, we submit, that the decision of the Court in the *Wong Yang Sung* case, *supra*, is conclusive of the position of the Appellant under their Assignment of Error No. 1, and under their Argument as set out in their Jurisdictional Statement filed in connection with their appeal herein. However, counsel for Appellants in their Jurisdictional Statement state that the issue respecting the qualifications of the Examiner presented as it is in the instant case, was not presented to nor decided by this Court in *Riss & Co.* v. *U. S.*, 341 U. S. 907.

We admit that this issue was not present in the *Riss & Co.* case. However, it is our studied opinion, and in this we feel that the Appellants agree as did the District Court in the instant case, as well as the District Court in the case of

*W. J. Dillner Transfer Co.* v. *U. S., et al.*, for the Western District of Pennsylvania, that this Honorable Court determined that proceedings under Section 207 of Part II of the Interstate Commerce Act are proceedings of such nature as require a hearing, all as provided for in Section 5 of the Administrative Procedure Act, *supra*.

In other words, we construe the decision of this Court in the *Riss* case, as holding that Section 207 of Part II of the Interstate Commerce Act must be held with the same dignity and in conformity with the provisions of the Administrative Procedure Act, the same as proceedings under the Immigration Act.

Further, it has long been settled that, "administrative orders quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence'." *Interstate Commerce Commission* v. *L. & N. Railroad Co.*, 227 U. S. 88, l. c. 91.

The same principle was reiterated by Chief Justice Hughes in the case of *Morgan* v. *United States*, 304 U. S. 1, l. c. 14 and 15, wherein it was said:

> "The first question goes to the very foundation of the action of administrative agencies entrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the legislature. The vast expansion of this field of administrative regulation in response to pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character, the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing',—essential alike to the legal validity of the administrative regulation and other maintenance of public confidence

in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard'. St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292, 304, 305; Railroad Commission of California v. Pacific Gas & Electric Co., 302 U. S. 388, 393; Morgan v. United States, supra."

Thus, the principle appears to have long been established that whether the underlying statute requires that a hearing be held, or not, "due process" requires that such hearing be accorded to all parties if the order is quasi-judicial in character; such judicial interpretation is necessary to render the statute valid. *Wong Yang Sung* v. *McGrath, supra.*

Since this has been concluded, we again submit that argument of the issue now prosented would merely constitute a reargument of the same issues presented in the case of *Wong Yang Sung* v. *McGrath, supra.*

It is interesting to note that nowhere in the Jurisdictional Statement filed on behalf of Appellants is any reference made to the *Wong Yang Sung* case. Relative to the cases cited in support of the proposition that the Courts will not consider objections not presented to the Commission, the matters decided in said cases did not relate to issues which are basic, jurisdictional and which go to the inherent validity or invalidity of the order under attack because of lack of due process.

At Page 10 of the Jurisdictional Statement of Appellants herein, Appellants state that, "if the Commission had been informed through timely objections that a large number of the parties to proceedings under Section 207 were contending that the Administrative Procedure Act was applicable, it might well have followed a different course of action, such as complying with that Act out of abundance of caution, or asking Congress for clarifying legislation."

Appellant will urge, as it did in the Court below, that Appellee has not exhausted its administrative remedies. Such suggestion begs the question, as it cannot be contended by Appellants that they were unaware of the lack of qualification of the Examiner to whom the case was assigned. Certainly, the Commission was in the better position to know such fact. Its assignment of the case to one not a qualified hearing examiner indicates the position which the Commission had taken with respect to the necessity for assigning such matter to a qualified hearing examiner. Such act of assignment constituted a decision or order by the Commission on that issue. Exhaustion of administrative remedy, even had it been shown that Appellee had knowledge of the lack of such qualification, would have been of no avail, for had the Commission been minded to observe the requirements of law, it would have done so, whether Appellee had exhausted its remedy or not. Certainly, it cannot now be contended that had Appellee exhausted its remedy before the Commission, the proceedings would have been reopened for hearing in accordance with law. We cannot understand that citizens in dealing with their Government must consider that their Government will not observe the law, unless the citizen complains. Further, the previous attitude of the Commission in this regard had been crystallized, as witness its refusal to comply with the Administrative Procedure Act after persistent efforts of Riss & Co. in its case, which we submit establishes the law of the instant case. Further, it is submitted that the instant issue is purely one of law not requiring new or amplified factual determinations, and consequently may be presented for the first time on judicial review. *Block Motor Co.* v. *Comm'r of Internal Revenue*, 125 F. 2d 977.

Again at Page 12 of the Jurisdictional Statement filed herein, Appellants beg the question by attempting to point out the effect of this decision upon the action of the Inter-

state Commerce Commission taken on Section 207 applications between the effective date of the Administrative Procedure Act and the Supreme Court decision in the *Riss & Co.* case. Such argument merely attempts to point up the inexpediency of reversing the lower court in the instant case, which reversal, we submit, would constitute a reversal of the *Wong Yang Sung* v. *McGrath* case and the *Riss & Co.* v. *U. S.* case.

We submit that when considerations of due process are involved, expediency cannot control the decision of the Court, inasmuch as fundamental Constitutional rights are involved.

Further, the Commission was aware of the passage of the Administrative Procedure Act and simply because it, as an arm of the Federal Government, did not, for reasons known only to itself, see fit to comply with that law, it cannot now seek to avoid the effect of its own non-compliance.

The question of the assignment of qualified examiners to proceedings under Section 207 was raised in numerous cases before the Interstate Commerce Commission prior to the *Riss & Co.* v. *U. S.* decision, in each and every one of which the Commission took the position that the Administrative Procedure Act was not applicable to such proceedings. The position of the Commission in this respect was adequately demonstrated in the *Riss & Co.* v. *U. S.* case, so that timely objections would have availed this Appellee nothing, nor any other party to any of the other 2,500 or so proceedings referred to in the Jurisdictional Statement.

Further, we submit, that a party to a proceeding before the Interstate Commerce Commission or any other agency of Government, has a right to assume that such agency or commission will comply with the law. As the Honorable Ruby M. Hulen, one of the Judges comprising the special Statutory Court in the instant case, pointed out, "I think it is a presumption of law that the Commission will obey

the law and follow the law." We submit that the Commission, nor any other Agency of our Government, should not be permitted to gain advantage over its citizens through willfull non-conformance to the law. As Judge Hulen further pointed out that if the position of the Appellants is sustained, "if the Commission can put it over without the man (Appellee) learning about it, that is all right?" We submit that for the Court to tolerate such abuse and disregard of law is immoral and contrary to the letter and spirit of Constitutional guarantees.

To state the proposition directly and unequivocally, we find that position of the Appellants to be substantially as indicated by Judge Hulen above, namely, that a citizen of these United States has no right to assume that its Government, or any branch thereof, will act in accordance with the law and consequently, in every proceeding in which that citizen participates wherein his Government is involved, he must question the legality of his Government's actions. Such, we submit, is not the true spirit or letter of the law of these United States; nor does the true spirit or letter of the law of these United States permit a violation of law and ignoring of law by any branch of the Government without court sanction for such violation, either of omission or commission. Expediency cannot, we submit, determine the application of the law. Should such be the rule, it is submitted, that Constitutional guarantees, whether of due process or of any other right, would no longer be guarantees, but would merely be licenses granted at the will of the Government to be revoked when the Government will no longer tolerate the existence of such licenses.

From the above, it is apparent that this appeal presents no new, novel or substantial question.

Accordingly, it is respectfully submitted that the judgment and decree of the District Court in the instant case be

ruled as having been determined by the case of *Riss & Co.* v. *U. S., supra,* and *Wong Yang Sung* v. *McGrath,* and be affirmed.

Respectfully submitted,

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